Supreme Court, U. S.
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No. 97-347

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT G. KAUCKY,

Petitioner,

v.

SOUTHWEST AIRLINES CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN FEDO
Counsel of Record
NEAL, GERBER & EISENBERG
Two North LaSalle Street
Suite 2200
Chicago, Illinois 60602
(312) 269-8000

Attorney for Respondent

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

14 pp

QUESTION PRESENTED

Whether the decision of the United States Court of Appeals for the Seventh Circuit, holding that petitioner's claim for a tax refund may be asserted only against the government, was consistent with the Internal Revenue Code.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties. Respondent Southwest Airlines Co. is a corporation; it is not the subsidiary of any other corporation, and it has no nonwholly-owned subsidiaries.

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STATEMENT OF THE CASE

The petition in this case is one of two that are currently pending which seek this Court's review of similar decisions in, respectively, the Seventh and Fifth Circuit Courts of Appeals. In each case the court of appeals upheld the dismissal of putative class action claims against Southwest Airlines Co. ("Southwest"). In the present case, the Seventh Circuit affirmed the district court's judgment dismissing plaintiff Robert G. Kaucky's ("Kaucky") complaint for lack of subject matter jurisdiction.[1] In No. 97-374, the petition seeks review of the Fifth Circuit's decision in *Sigmon v. Southwest Airlines Co.*, 110 F.3d 1200 (1997), in which the court affirmed summary judgment for Southwest.[2]

The claims in both cases arose from the collection by Southwest of a ten percent excise tax on domestic air transportation occurring on or before December 31, 1995, as provided in section 4261 of the Internal Revenue Code, 26 U.S.C. § 4261. The plaintiffs in both cases alleged that Southwest had collected taxes on tickets purchased in 1995 for travel in 1996 and had failed to refund the ten percent assessment when the statute lapsed on January 1, 1996. Section 4261 and the anomalous legislative circumstances concerning its nonrenewal in December, 1995, are discussed in detail in the opinions of the Seventh and Fifth Circuits, *Kaucky* App. 1-2,

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[1] The decision of the Seventh Circuit in *Kaucky v. Southwest Airlines Co.* is reported at 109 F.3d 349 (1997). It is reprinted in the petition at App. 1-9, and all citations herein to the opinion are to the appendix.

[2] Southwest will file a separate brief in opposition to the *Sigmon* petition.

5-6, and *Sigmon* App. A-2 – A-3, respectively. The procedural facts relevant to the *Kaucky* petition are fully and accurately stated in the Seventh Circuit's opinion, to which the Court is respectfully referred.

REASONS FOR DENYING THE WRIT

The principal question before the Seventh Circuit was "whether in suing Southwest, passenger-taxpayer Kaucky was seeking a tax refund." App. 3. Kaucky argued strenuously on appeal that, because section 4261 of the Internal Revenue Code was ineffective after December 31, 1995, the ten percent surcharge on his ticket was not a tax and, accordingly, he was not bound by the Code's tax refund procedures. In deciding the case, the court noted that, "[i]n a literal sense, this is not a suit for a refund of taxes, . . . [b]ut we do not think the literal sense is the right sense." App. 3-4. The court then held, "Money collected in error by a lawful agent, public or private, of the Internal Revenue Service can be recovered only from the government, because a claim or suit to collect such money is a claim or suit for a tax refund." App. 8.

In his petition, Kaucky has effectively abandoned his previous argument and does not seriously dispute the Seventh Circuit's determination that his claim was a tax refund suit. Instead, he now argues that the court erred in not devising new avenues for seeking tax refunds. For the following reasons, the questions presented in Kaucky's petition do not merit this Court's review.

1. The First Question Raised in the Petition Is Not Presented by the Case, Because the Seventh Circuit's Decision Is Not in Conflict with Any Other Authority.

The Seventh Circuit's decision in this case conflicts with no other authority. Several courts have recently considered whether taxpayers may pursue refund claims against airlines for charges erroneously assessed under section 4261 of the Internal Revenue Code. In each case, the taxpayer's right has been held to be limited to a claim for a refund from the Internal Revenue Service followed by a suit against the United States. *Sigmon v. Southwest Airlines Co.*, 110 F.3d 1200 (5th Cir. 1997); *Lehman v. USAir Group, Inc.*, 930 F. Supp. 912 (S.D.N.Y. 1996); *Brennan v. Southwest Airlines Co.*, No. C96-1841-VRW (N.D. Cal. Sept. 6, 1996), *appeal docketed*, No. 96-17053 (9th Cir. Nov. 6, 1996); *Eisenman v. Continental Airlines, Inc.*, No. 96-1368 (D. N.J. July 23, 1997). *See also DuPont Glore Forgan Inc. v. American Tel. & Tel. Co.*, 428 F. Supp. 1297 (S.D.N.Y. 1977); *Burda v. M. Ecker Company*, 954 F.2d 434 (7th Cir. 1992); *Edgar v. Inland Steel Co.*, 744 F.2d 1276 (7th Cir. 1984).

Further, the Seventh Circuit's decision is not even in "conflict" with the tax refund procedures of the Internal Revenue Code, as Kaucky contends. Kaucky states that, under section 6415 of the Internal Revenue Code, 26 U.S.C. § 6415, "carriers are *allowed* to remit monies to consumers from whom the carrier made a collection." Pet. 12 (emphasis added). He alleges that "the IRS had requested airlines to follow 26 U.S.C. § 6415 . . . ." *Id.*

There is, however, no conflict between section 6415 and the Seventh Circuit's decision. The court did not hold

that an air carrier is prohibited from making direct refunds to passengers. Indeed, the court specifically noted that larger airlines had availed themselves of the alternative procedure provided under section 6415, commenting that "[t]his was a fine way to proceed . . . ." App. 6. But the court also recognized that the refund procedure under section 6415 is neither exclusive nor mandatory. It declined to hold that Southwest was *obliged* to process refunds of erroneously collected taxes, and it concluded that the taxpayer had no right of action against Southwest under section 6415. App. 8.

Far from conflicting with section 6415, the decision of the Seventh Circuit reflects careful consideration of that statute and its limited role in the Internal Revenue Code's refund procedures which, as the court stated, are "designed to confine suits for the refund of federal taxes to suits in the federal courts against the government in order to protect its private as well as public agents from being whipsawed." App. 8; citing *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981).

The "conflict" asserted by Kaucky is illusory. The decision of the Seventh Circuit is entirely consistent with the Internal Revenue Code and with the numerous cases in which the Code's pertinent provisions have been construed. The first question presented in the petition thus is no issue at all and does not warrant this Court's review.

2. The Seventh Circuit Properly Declined To Recognize "Exceptions" to the Internal Revenue Code's Established Refund Procedures or To Fashion New Remedies Outside the Statute.

The second question Kaucky presents for the Court's review is whether the Seventh Circuit ought to have recognized "exceptions" to the Internal Revenue Code's tax refund procedures and should have found an "implied cause of action" under section 6415. Extraordinary new measures are required, Kaucky argues, for three reasons: 1) there is otherwise "no means to police corporate entities" that may try to "manipulat[e] the tax system"; 2) the Internal Revenue Service lacks "assistance in properly remitting wrongfully collected funds to the public"; and 3) passengers who paid the tax have "no adequate access" to refunds. Pet. 15.

At best, Kaucky's argument is a call for legislative action. If the statutory scheme were deficient in some way, it would not be the judiciary's role to engineer the solution.[3] Moreover, the federal tax system is not de-

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[3] Kaucky's twin arguments for judicial involvement—*i.e.*, that the exception recognized in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), ought to be applied here, and that the Seventh Circuit failed to determine, under *Cort v. Ash*, 422 U.S. 66 (1975), whether additional remedies are implied by the statute—are misguided. The *Enochs* exception applies to actions barred by the Anti-Injunction Act, 26 U.S.C. § 7421 (that is, actions seeking to restrain collection of a tax), and not to cases where taxpayers are seeking refunds. In *Bob Jones University v. Simon*, 416 U.S. 725, 742-47 (1974), the Court firmly rejected *any* extension of the *Enochs* exception, and there is no reason for the Court to revisit the question here. And while the Seventh Circuit rejected Kaucky's plea for an implied remedy without citing *Cort*, it *is* clear that the

(continued...)

ficient in the ways asserted by Kaucky and is not in need of the extrapolated remedies he favors.

The Seventh Circuit made a point of emphasizing that the Internal Revenue Code provides ample policing mechanisms, "criminal as well as civil," that can be used against collection agents. App. 7, *citing* 26 U.S.C. §§ 6672(a), 7202, 7501 and *Begier v. IRS*, 496 U.S. 53, 60-62 (1990). *See also* App. 5.

The court also recognized that, while alternative measures might spare the Internal Revenue Service "the burden of processing minuscule claims" (App. 8), shifting of the burden to the government's private agent could leave the agent unfairly "caught in the middle. We do not think that such a result was intended or would be consistent with the system of federal tax collection that Congress has created." App. 4.

Kaucky's assertion that, absent a new judicial remedy, "millions of customers will be left with no remedy" (Pet. 19) is simply untrue. Any passenger may file an administrative claim with the Internal Revenue Service. *See* 26 C.F.R. § 601.403(d). Thereafter, litigation may be brought against the government. 26 U.S.C. § 7422. The district court found that the administrative procedures "are efficient and of minimal cost," and that "like thousands of other airline passengers . . . , [Kaucky] is almost

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[3] (...continued)
question was analyzed appropriately and in accordance with this Court's more recent decisions. *See* App. 8, *citing Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979); and *Meghrig v. KFC Western, Inc.*, 116 S.Ct. 1251, 1256 (1996).

certain to get his refund." App. 18. The court of appeals speculated that "many people would not bother to seek a refund" (App. 7), but deciding to forego an established remedy is a far cry from having no remedy at all.

The only real question raised by Kaucky's suit is whether the judiciary should create a new cause of action in response to the anomalous circumstances surrounding a temporary lapse in the federal excise tax on air travel. Significantly, when Congress re-imposed the tax (*see* Pub. L. No. 104-188, § 1609(b), 110 Stat. 1755, 1841 (1996); Pub. L. No. 105-2, § 2(b)(1), 111 Stat. 4, 5 (1997)), it did not deem new remedies necessary. None of the several courts that have considered the question have found that a new remedy—one that would be at odds with the established statutory scheme—is warranted.

3. The Availability of Discovery, or the Lack Thereof, Did Not Affect the Outcome in This Case.

Kaucky complains at length that he "was denied the opportunity to conduct any discovery" in this case. App. 8-11. That assertion is both erroneous and immaterial.

The district court expressly authorized Kaucky to commence limited discovery on an expedited basis while Southwest's motion to dismiss was pending. Kaucky failed to avail himself of this opportunity. He did, however, obtain copies of depositions and other discovery materials provided in *Sigmon v. Southwest Airlines Co.*, which then was pending in the Northern District of Texas, and he was permitted to file them and make use

of them in this case. *See* App. 10-11. It is not accurate to suggest that discovery was denied.

It also is disingenuous to suggest that additional discovery would have altered the result below, inasmuch as Kaucky has not indicated what facts, if discovered, would compel a different outcome. As the Seventh Circuit noted, "the worst [Kaucky] claims is that Southwest was overconfident in believing that the tax would be extended" and thus erred in its handling of the matter. App. 7-8. Such an error, the court concluded, is no different from an agent's technical error, and is not ground for a suit against the collecting agent rather than the government. *Id.* Additional fact discovery would not have altered the conclusions of the courts below because it could not have cured the fundamental legal infirmity of the asserted claim.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEPHEN FEDO
Counsel of Record
NEAL, GERBER & EISENBERG
Two North LaSalle Street
Suite 2200
Chicago, Illinois 60602
(312) 269-8000

Attorney for Respondent